No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,
Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased.

Appellees.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BENJAMIN H. KIZER,
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THE FRANKLIN PRESS, SPOKANE

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STATUTES AND TEXTS

PREFATORY REMARK

In this brief we shall reply point by point to the points of appellees, using substantially appellees' headings.

I

APPELLEES' "ADDITIONAL STATEMENT"

In view of the high degree of credit given to the findings of fact of the trial courts as to credibility of witnesses, we are startled to see appellees open their brief with an attack, first, on the truthfulness of the testimony adduced by appellants and, second, on the weight of that testimony, when the trial court has so clearly found against them on both these points. We shall note later another confession of weakness by appellees in their futile attempt to evade the Washington decisions, that so fully apply to the findings in favor of appellants, by resorting to the decisions of other states in the hope that this court will prefer such decisions as those of Maine and Illinois to those of the Supreme Court of Washington.

Thus appellees open their brief by an "Additional statement" in which they

> "urge that the testimony was insufficient to support the finding that the alleged oral agreement was entered into by Catharina Schlaadt and John Henry Kucks."

This attack on the findings of the court, if the trifling criticism of the testimony made by appellees rises to the dignity of an attack, consists of three points:

1. The statement that all of the witnesses for appellants by reason of their relationship to Grover Schlaadt were "interested" in the outcome. Appellees do not point out any improbability, any weakness in their testimony. They are content to make the suggestion of interest and let the matter drop. But the trial court was manifestly persuaded by the candor, the frankness, the bearing and the demeanor of these witnesses that they were telling the truth and he so found. Would any appellate court, merely on the suggestion of interest, be warranted in concluding that each and all of these witnesses were lying and that the trial court ought not to have believed them, especially when their testimony is so well supported by written documents, the wills in Exhibits 4 (R. 37) and 5 (R. 39), and by the inherent probabilities of the case?

2. The second criticism is rather legal than factual. Appellees are at pains to point out that the witnesses with one exception did not say how Kucks "was going to divide the land" and they quote Arletha Schlaadt as testifying that Kucks "later said he was going to leave the Davenport farm to Grover and the Canada land to Garfield (R. 93)". Reference to the record will show that this is not a statement of Arletha's testimony. On cross examination

she testified that Kucks told her

> "I would like to have Grover [have the Davenport land], because Grover is a good farmer." (R. 93. See also R. 82, 84, 88, 91.)

These words "I would like" are significant. Read in connection with the will of February 11, 1946, executed at the time of this conversation, they indicate that Kucks undertook only to devise and bequeath his estate to the two sons of his deceased wife, leaving it to them to divide, but with this oral expression of preference that Grover arrange to take the Davenport land. It is so much the custom of a father to leave his estate in undivided shares to his children or to any other like group of beneficiaries of equal rank that this was a perfectly natural provision of the will. Kucks regarded Grover and Garfield as sons and introduced Grover's son as "my grandson" (R. 135)).

True, at the bottom of this same page (R. 93) the cross examiner put words in Arletha's mouth that indicated that Kucks was leaving by his will the Davenport and Canadian lands to Grover and Garfield respectively. Arletha, not alert enough to observe this distortion of her earlier testimony, assented. But this does not change her own account of the conversation, which is borne out by the will he had just executed.

3. Appellees' third point in their "additional statement" is an attack upon finding of fact number

5 (R. 16), which is:

> "Further this testimony on behalf of plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein."

To this appellees suggest that

> "The first will made out by the decedent left all of his property to Catharina Schlaadt and none of the subsequent wills left *all* of his property to the appellants." (Emphasis ours.)

The court will observe that the first will executed during marriage left the property to his "beloved wife" (Ex. 4, R. 37). Kucks was 82 at this time, five years older than Catharina, and would naturally conclude that in all probability his wife would outlive him, hence it is a fair inference that he left her the whole of his estate for her to pass on to her sons.

As to the second will the court will observe that it (Ex. 5, R. 39) left the whole of the estate to the two sons save only $500 for an infant foster child named Gary Handel. This, however, was left in trust to Grover Schlaadt and if Gary did not reach the age of 21 the proceeds were to go to Grover and Garfield Schlaadt. Also, Grover was appointed the executor of the will, which was nonintervention. In an estate of over $90,000 to make so minor and conditional a bequest as $500 is assuredly not even a flaw upon the full performance of the promise made to Catharina Schlaadt.

Such niggling criticisms of these two wills, like the aspersion cast upon the probity of appellants' witnesses, indicate the lengths to which appellees feel obliged to go in their endeavor to find fault with the findings of fact of the trial judge.

As Judge Driver said,

> " . . . it isn't at all unusual that he [Kucks] should, in carrying out a promise of this kind, first make his will to his wife, and then make it out to the two boys in the way he did" R. 142.

II.

ARGUMENT

A. *Was Oral Agreement Established by Clear and Convincing Evidence?"*

On this so slight a base of criticism of the court's findings of fact appellees baldly assert that in spite of the presumptions in favor of the trial court's findings of fact they

> "do not believe that the alleged prenuptial oral agreement was established by that degree of evidence required by the Supreme Court of Washington to establish such contracts."

This is followed by printing in italic type the rule of the Supreme Court of Washington that an oral promise to make a will or to devise or bequeath property must be established by evidence

> *"that is conclusive, definite, certain and beyond all reasonable controversy."*

No reason is advanced, no fact or circumstance is adduced on which this belief could be based and counsel blandly pass over the fact that the trial court in its finding of fact 5 (R. 16) held that the evidence adduced by appellants "is conclusive, definite, certain and beyond legitimate controvery." Not only was the evidence found in favor of appellants in precisely the terms so emphasized by appellees, but the court went on to say, as we have quoted before:

> "Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein." (R. 16.)

On the next page of appellees' brief, again without calling the court's attention to any point upon which appellants' proof was insufficient, appellees point out that in order to establish an oral contract it is necessary to show by such conclusive evidence:

> "1. That the contract was entered into;
>
> 2. That services were actually performed;
>
> 3. That services were performed in reliance on the contract."

Here, too, the court's findings cover all three of these terms. Finding 5 (R. 16) satisfies point one "That the contract was entered into"; findings 7, 8 and 9 (R. 17) cover the point "That services were actually performed"; finding 6 (R. 17), in its recital that the promise "was the special inducement" and that Catharina "would not have married [Kucks]

but for such promise", shows "That services were performed in reliance on the contract."

We feel that we are battling cobwebs in meeting "points" so destitute of any foundation in fact, but appellees place so much reliance upon them that we have no alternative. In this behalf it is perhaps well for us to recite as briefly as we can the significance given to findings by our federal appellate courts:

Rule 52(a) of Federal Rules of Civil Procedure, 28 U. S. C. A. 13:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *Lewis Mach. Co. v. Aztec Lines* (7 Cir.), 172 F. 2d 746, 748, the effect given to findings of fact is stated thus:

> "Since this case was tried by the court without the intervention of a jury, the findings of fact made by the trial court may not be set aside by us unless clearly erroneous. Federal Rules of Civil Procedure, rule 52(a), 28 U. S. C. A. If there is any substantial evidence to support these findings, the liability of Aztec is established here. In considering this record, we look only to the evidence most favorable to the District Court's findings and such reasonable inferences as may be drawn from such evidence."

In *Skelly Oil Co. v. Halloway* (8 Cir.), 171 F. 2d 670, 674, the rule is stated:

> ". . . The power of a trial court in a non-jury case to decide doubtful issues of fact is not lim-

> ited to deciding them correctly. On review, the question is not what finding of fact the trial court might have reached on the evidence before it, but whether there was substantial evidence upon which the finding which the court made could properly be based. We may not set aside the finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law."

This circuit, in *Lassiter v. Guy F. Atkinson Co.*, (1949), 176 F. 2d 984, has stated the rule in substantially the same terms.

These and many more cases to the same effect are collected in *Barron & Holtzoff, Federal Practice & Procedure* (Rules Edition, 1950), vol. 2, pp. 834-848.

Even with a much less favorable rule than this, in view of the fact that appellees have not been able to point to any evidence looking to a contrary view, it is clear that the findings of fact of the trial court are invulnerable to attack.

B. *"Contract Void Under Statute of Frauds."*

We are at a loss to understand why appellees place such emphasis on the language of the statute of frauds, especially when they conclude their arguments and quotations with the remark that the question to be resolved is whether the marriage and the making of the wills "constitutes sufficient performance to take the contract out of the statute of frauds." While there is more to it than merely the

marriage and the making of the wills, we are in complete agreement that the question is whether there was sufficient performance to take the contract out of the statute. The findings of the court, to our minds, clearly establish not only part, but complete, performance on both sides of the oral contract which takes the contract out of the statute. We have not at any time contended otherwise.

This heading is illustrative of the tactics of appellees throughout their brief. Under this and the next two headings of their brief appellees content themselves with enunciating, first, that this oral contract is void under the statutes, ignoring the full performance on both sides; second, that marriage is not sufficient performance, just as if marriage alone were relied on; and, third, "a will is not sufficient performance," just as if we had nothing but an oral promise and a will. Not once do appellees look at the case of appellants as a whole, with all of its factors of performance, both partial and complete. They are content to split the evidence into segments and weigh each bit by itself as though that bit were the whole of the case.

To the contrary, as we pointed out in our opening brief, the Washington Supreme Court properly considers each case as a whole, takes into account all of the relevant facts, as this Court will do. Only in this manner can a just appraisal of the case of appellants be made.

This "divide and conquer" policy as a means of destroying an unwary enemy may have its place in war. It is manifestly out of place in an impartial consideration of legal problems.

C. *"Marriage Not Sufficient Performance to Remove Bar of the Statute."*

Under this heading, which is really the theme song of appellees' brief, counsel for appellees ignore or wave to one side all facets of Kucks' proposition to Catharina except that one which presented the necessity that she marry him. The other sides of the proposition, just as important and vital as the marriage ceremony, are ignored—for understandable reason.

Let us look at the reason for the prohibition of the statute. Courtship and marriage are normally the incidents of the young, before either of the parties has "settled down." In the mating season of life all manner of extravagant statements are apt to be made by either party. To hold either of the parties to incidental oral statements or promises, when passion rather than reason is ascendent, is rightfully contrary to the policy of the law embodied in the statute of frauds.

But we are not dealing with such a case nor with one remotely resembling it. At pages 7 and 8 of their opening brief appellants called the attention of appellees to the fact that the Supreme Court of Washington has many times recognized "Each case of the

kind now before us must rest upon its *own peculiar facts* and circumstances." (Italics ours.) To this statement of our court appellees make no answer whatsoever. They throw out of the case all the surrounding circumstances. They seek to reduce the case to the single formula "where marriage is involved no oral promise is binding."

Let us, then, look at the "peculiar facts and circumstances" that call for a broader analysis and understanding than appellees are willing to apply.

The findings of fact, augmented by the undisputed testimony, disclose that Kucks, a German-American of 81 living in Davenport, Washington, having recently lost his wife, wanted a second wife to look after him in his sunset years at his home in Davenport, Washington. Without courtship, preliminary or otherwise, he appealed to the mother-love of Catharina by a promise to leave all that he had to her sons, pointing out that he had no children or near relatives of his own.

Kucks did not regard his unheralded and point-blank offer as a sentimental proposal of marriage but as "a *proposition* to make to your mother . . . I told her if she would [marry me], I would leave all my property . . . etc." (R. 72.) (Emphasis ours.)

Catharina both recognized and treated this as the material proposition that it was. She saw that the nub of the proposition was not marriage alone but a performance quite apart and beyond that. Kucks

was asking her to uproot her Portland home, move into his Davenport home and thenceforward perform its household duties for him.

She was unwilling to undertake performance of that requirement of the proposition until she knew what sacrifice it would entail. She and Kucks both recognized that this requirement was the motive for the offer and that her acceptance of the offer depended upon her willingness to render that performance. She said to Arletha, wife of Grover Schlaadt, in the presence of Kucks, "I told Henry he'd have to give me a little time to think it over; you know, I have a pretty nice home here, Henry." Henry replied, "Kate, I know you have; I have a nice home in Davenport, too." (R. 72.) Catharina said, "I'll tell you what I'll do, Henry; I'll go up to Davenport and look your place over, then I'll give you my answer." (R. 72.)

Having lived in her own comfortable home for a quarter of a century, having three generations of her own flesh and blood near her and devoted to her, having many friends resulting from half a century of living in Portland, she was now asked by Kucks to make a very great sacrifice, to give up all this and go to a strange town at her advanced years. (R. 74, 77.)

So she made this trip to Davenport alone, remaining away ten days. (R. 79.) Only then did she decide that the provision she could make as a mother

for her two sons was worth the sacrifice demanded of her (R. 81)). The testimony of appellants' witnesses, credited and believed by the trial court (R. 141, 145), is that in explaining her decision to her son and daughter-in-law she said, "You know, I am thinking about my kids." (R. 116.) And on other occasions to Arletha, to Neva and Grover Schlaadt, Jr., she said that she could trust Henry Kucks to keep his promise to her, that "he will stick by my boys" (R. 82, 116, 131, 132, 134).

On her return the following took place (testimony of Arletha Schlaadt, wife of Grover Schlaadt, Jr.):

> "A. She took Henry's measurements of his floor, and said, 'I want to get a rug, because he has linoleum on his floor.' She said, 'His house is dirty, but I can clean it up, and with my furniture I can make it look nice,' so then I went uptown with her a little later and we picked out a rug." (R. 82; cf. 103.)

After the wedding in August 1944 Kucks and Catharina spent a week in Catharina's home packing up Catharina's furniture, furnishings, personal belongings and dishes with which Catharina proposed to furnish the Kucks home. In major part, so far as the witness could recall, this consisted, in addition to the new rug for the living room, of another rug for the bedroom, dining room table and six chairs, rockers, davenport and chair, blankets and a quilt and dishes (R. 87, 103). These contributions had to be made to make the Kuck's home more livable and more like the better living conditions to which she was accustomed.

To the trial court, thinking, perhaps, of the usual marriage at youth or middle age, this action may seem only the ordinary incident of marriage. But to Catharina it was of vital importance. Her final acceptance of this, to her, hard condition must be given great weight, as an act of performance on her part, by any person imaginative enough and sensitive enough to see with *her* eyes the sacrifice it imposed on her.

At page 23 of their brief appellees refer to the statement made by our Supreme Court in *Alexander vs. Lewes* (1918), 104 Wash. 32, 175 Pac. 572, that "it is not the quantity but the character of the consideration that controls." JUST SO! A young woman, eager to have a husband and home of her own, might attach very little importance to the removal from one place to another. But it was of great importance to Catharina and, when she finally bound herself to sacrifice her own home and all it meant and to go to Davenport and to make Kucks' home livable for them both, she had done what was primarily and basically required of her to perform this contract. Who can say that her conduct, quite apart from the act of marriage, was not an act of performance of the, to her, heavy burden that she necessarily took upon herself?

To ignore this aspect of the case altogether, as appellees do, to treat it as the trial court did in his second oral opinion when he says, "Everything that

she did was purely *incidental* to the marriage, it is something that a wife would be *expected* and be *required* to do," is, it seems to us, to be flatly contradictory of all normal considerations in marriage. We do not here refer alone to the material contributions of Catharina, though they are substantial, but still more to the spiritual ties, the fruit of a long and useful life, that had to be ruptured.

Contrary to the conclusion of the trial court, the usual, the incidental feature of marriage is that the bride is lifted out of her dependence on her parents in their home, where she is a secondary figure, to the position of mistress in her own home, newly furnished for her by her husband. Here, we have exactly the opposite situation. The elderly bride already had an independent position and a home of her own, which she is obliged to surrender. Instead of having a husband to furnish her with a new home, she must herself add largely to its furnishings to raise it toward that standard of style and comfort which she has earlier achieved.

It is because Catharina's situation and sacrifices are the reverse of what is "incidental," what is "expected," what the average wife is "required to do," that we stress the importance of these actions and sacrifices of Catharina as a necessary and dominant part performance of the oral contract, far more significant and important than the minor feature seized upon by the Washington Supreme Court in

the case of *In re Fischer's Estate* (1938), 176 Wash. 41, 81 P. 2d 189.

In that case, the court will recall, the bride brought $700 to the marriage and the husband $1,500. As an incident to their marriage they agreed that this should be treated as community property instead of the separate property of each. They further orally agreed at that time that each would make a reciprocal will, leaving his or her estate to the other, and so they did. The wife made no sacrifice of any kind. She gained more than she gave by this oral agreement to merge assets. But, 12 years later, the wife made a second will in favor of her sister, covering her half of the community estate. In the probate of the wife's estate the Supreme Court recognized this incidental oral agreement respecting conversion of separate estates into community property, *plus* the wife's initial execution of her will in favor of her husband, *although later revoked,* as *full* performance by the wife of their oral agreement to make wills in favor of each other.

Manifestly, the Fischer case is on all fours with the case of appellants. How do appellees treat it? Largely, their brief (p. 32-33) ignores it, merely remarking that "the husband relinquished his separate property to his wife, and also made his will. The court *properly* held that there was sufficient performance of the oral contract." (Emphasis ours.)

We thank counsel for this frank admission that the Fischer case represents the law of this state. But we must point out that, in their eagerness to distinguish this case from ours, no doubt by inadvertence, they misstate its facts. The husband did *not* "relinquish his separate property to his wife." The allegation of the pleadings is that husband and wife agreed "to pool their separate properties and held them as community property." And, as we have seen, it was the *wife's* contribution to that fund of only $700, plus the making of her first will, that our Supreme Court said constituted *full* performance on her part, and obliged the decree to go against her estate. Can this court say, as did the trial court, that the sacrifices and contributions of Catharina are "nothing," while this trifling concession of the wife in the Fischer case is adequate to take that case out of the statute of frauds?

Even the trial judge, at the conclusion of the testimony, before he had reached his conclusion on the law of the case, was aware of the unique features of this marriage and of some of the sacrifices Catharina had to make. He said:

> "A thing that appeals to me is that here is a widow woman about, as I recall, 76 years of age. She's been widowed for a good many years. It isn't one of these rebound situations where even an elderly person in the first shock of loneliness and loss takes a companion by marriage by way of relief. . . . She had settled down in a comfortable home in Portland, and had her children and grandchildren near at hand, so it isn't likely

> that she would marry an 81 year old man unless there was some inducement other than the romantic considerations that usually lead to marriage. To quote from Hamlet, I think it's apt here, when he was upbraiding his mother for marrying his uncle so soon after his father's death, he said to her, 'You cannot call it love, for at your age the heyday of the blood is tamed, it's humble and waits upon the judgment'; so I think that's the situation here, and just as a matter of common sense and ordinary human experience, it's likely and reasonable that there was some special inducement that led this 75 year old woman in her circumstances to marry Mr. Kucks, so that to that extent I think it corroborates the testimony of these witnesses, which I said I have credited." (R. 142.)

The texts and cases from other states cited under this heading concern themselves only with oral promises followed by marriage and with no act either of part or of full performance. With such cases and texts we have no concern.

Of this character is *Koontz v. Koontz* (1915), 83 Wash. 180, 145 Pac. 201, the only Washington case cited under this heading except the cases taken from our opening brief, which appellees seek to distinguish. In the Koontz case, not the slightest act of performance is alleged or claimed, nor was any will drawn pursuant to the alleged oral agreement. It is altogether too remote to require comment.

Nor will we be drawn away from our consideration of the Washington cases, controlling here, into the easy task of distinguishing cases from other states.

All that is required for the determination of this case is found in the numerous cases adduced in our opening brief.

D. *"Execution of Will Not Sufficient Part Performance."*

Here, again, appellees are belaboring an effigy of their own creation. In our opening brief (p. 18) we pointed out, as clearly as we know how, that "our Supreme Court has several times held that the *mere* making of a will, with no other act of performance by either promisor or promisee, is not sufficient part performance" and we there considered most of the cases that appellees now cite. But we also pointed out that this was true only when the making of the will was unaccompanied by any other act of performance. Appellees ignore this vital distinction and hammer away at the broad rule as if it had somehow been drawn in question.

E. *"Marriage and Execution of Will Insufficient Performance."*

The most significant aspect of appellees' discussion under this head is that they do not cite a single case from the Supreme Court of Washington. They seek to overcome the telling weight of the Washington decisions, which have marked out a path of their own, by citing cases from other jurisdictions. Thus, they overlook the fact that this Court will decide this case as the Washington Supreme Court would decide it.

If we had no Washington decisions to bear upon the question, it would be appropriate to turn to the decisions of other states. But there is such a wealth of judicial decisions of Washington from which to drawn our conclusions that appellees' course is just the opposite of the course taken by the Washington Supreme Court itself.

Beginning with the decision of the case of *Eidinger v. Mamlock,* 138 Wash. 276, 244 Pac. 684, decided in 1926, followed by 27 other cases, discussing the validity of oral contracts under the statute of frauds, the Washington Supreme Court has not once supported its decision by citing a single case from other jurisdictions. These cases, in which our Supreme Court has relied solely on its own earlier decisions on this subject are:

Henry v. Henry, 138 Wash. 284, 244 Pac. 686;

Sweetser v. Palmer, 147 Wash. 686, 267 Pac. 432;

McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70;

Avenetti v. Brown, 158 Wash. 517, 291 Pac. 469;

Whittaker v. Titus, 166 Wash. 225, 6 Pac. 2d, 649;

Lohse v. Spokane & Eastern Trust Co., 170 Wash. 46, 15 Pac. 2d 271;

Clark v. Crist, 178 Wash. 187, 34 Pac. 2d 360;

Lager v. Berggren, 187 Wash. 462, 60 Pac. 2d 99;

Resor v. Schaefer, 193 Wash. 91, 74 Pac. 2d 917;

Wayman v. Miller, 195 Wash. 457, 81 Pac. 2d 501;

In re Fischer's Estate, 196 Wash. 41, 81 Pac. 2d 836;

Osterhaut v. Peterson, 198 Wash. 166, 87 Pac. 2d 987;

In re Swartwood & Welsher Estates, 198 Wash. 557, 89 Pac. 2d 203;

Thompson v. Weimer, 1 Wash. 2d 145, 95 Pac. 2d, 772;

Luther v. Nat'l Bank of Commerce, 2 Wash. 2d 470, 98 Pac. 2d 667;

Aho v. Ahola, 4 Wash. 2d 598, 104 Pac. 2d 487;

Allen v. Dillard, 15 Wash. 2d 35, 129 Pac. 2d 813;

Dau v. Pence, 16 Wash. 2d 368, 133 Pac. 2d 523;

Widman v. Maurer, 19 Wash. 2d 28, 141 Pac. 2d 135;

Payn v. Hoge, 21 Wash. 2d 32, 149 Pac. 2d 939;

Whiting v. Armstrong, 23 Wash. 2d 290, 160 Pac. 2d 1014;

Blodgett v. Lower, 24 Wash. 2d 931, 167 Pac. 2d 997;

Jennings v. D'Hooghe, 25 Wash. 2d 702, 172 Pac. 2d 189;

McLean v. Archer, 32 Wash. 2d, 201 Pac. 2d 184;

Southwick v. Southwick, 34 Wash. 2d 464, 208 Pac. 2d 1187;

Groenever v. Dean, 40 Wash. 2d 109, 241 Pac. 2d 443;

In re Boundy's Estate, 40 Wash. 2d 203, 242 Pac. 2d 165.

In only two of these 28 cases does the Washington Supreme Court even notice the existence of cases from other states concerning these oral contracts under the statute of frauds. In *McCullough v. McCullough* (1929), 153 Wash. 625, 280 Pac. 70, our Court distinguishes a single California case called to its attention by the defeated party and in *Luther v. National Bank of Commerce,* (1940) 2 Wash. 2d 470, 98 Pac. 2d 667, it likewise distinguishes or declines to follow a group of four cases from other states pressed on its attention by the defeated party. The fact that it has this task of distinguishing or declining to follow cases from other states in only these two cases indicates clearly that members of the Washington bar quite generally recognize that it is useless to go outside the decisions of our own state in connection with such questions. This is made the plainer in that when other questions of law arise in these cases the Washington Supreme Court draws freely on the judicial learning of other supreme courts.

In our opening brief at pages 9 et seq. we demonstrated by appropriate citations and quotations from

Washington decisions that Washington opinions were exacting as to quantum of proof of an oral contract otherwise void under statute of frauds, but once sufficient proof was offered they were *liberal* as to what constitutes part performance sufficient to take that oral contract out of the statute. Appellees formally ignore that demonstration but indirectly seek to answer it by the use of these citations and quotations from other states that are more strict than the Washington court as to what acts constitute part performance.

Further, in ignoring the Washington cases set forth in our opening brief which deal with contracts fully performed and therefore not within the statute of frauds and in seeking to rely solely on the decisions of other states, appellees do but reveal the weakness of their case in its most vital point.

Under this heading appellees once more run true to form. In each of their cited cases the only facts shown were the making of the promise followed by the marriage and the making of a will. No equities on behalf of the plaintiff were alleged or proved, no facts even remotely like the sacrifices and performance of Catharina appear in any of these cases.

By way of illustration, and without proposing to go farther, we analyze briefly the first case cited by appellees, which they regard as "*exactly* in point," *Hughes v. Hughes* (Calif. Dist. Ct. App., 1920), 193 Pac. 144. This is a rather smelly case of an infatu-

ated man making wild promises to convey real and personal property to the woman he was eager to marry. A few days after the marriage he made a will in her favor but he failed to build the $100,000 apartment house for plaintiff, or to pay off the $60,000 mortgage on plaintiff's property, or to give her the expensive jewelry, the ermine coat and the automobile he is alleged to have promised her.

In the first year of their marriage plaintiff brought suit to compel her husband to make these gifts, to convey the property and for a receiver. She did not allege that the will had been revoked. She was just refusing to be fobbed off with a will when what she wanted was the cash, the jewels and the furs. Of course, the will could not be used to prove these promises to make present gifts and conveyances. And this typical golddigger case is said by appellees to be "exactly in point"!

We do not propose to be led into further analyses of cases that would not have weight with the Supreme Court of Washington. We content ourselves with remarking that much of the language quoted is certainly out of tune with the decisions of our Supreme Court.

III

CONCLUSION

The weakness of the position of appellees is demonstrated by their persistent efforts to draw attention from the main question at issue in the following respects:

1. The opening of their brief with an attack upon the credibility of the witnesses of appellants in spite of the finding as to their truthfulness expressed by the trial court.

2. Their denial that the testimony of appellants is "conclusive, definite and beyond legitimate controversy," this also in the teeth of the trial court's finding.

3. Their contention that the first and second wills of Kucks do not corroborate the oral testimony of appellants, again in flat contradiction of the finding of the trial court.

4. Their unwarranted attempt to inject into Kucks' proposition to Catharina a specific mode of division of the property between Grover and Garfield.

5. Their implausible assertion that the inclusion of the tiny $500 additional bequest to the foster grandson of Kucks precludes will number two from being considered as in performance of Kucks' promise, once more in conflict with the view of the trial court.

ated man making wild promises to convey real and personal property to the woman he was eager to marry. A few days after the marriage he made a will in her favor but he failed to build the $100,000 apartment house for plaintiff, or to pay off the $60,000 mortgage on plaintiff's property, or to give her the expensive jewelry, the ermine coat and the automobile he is alleged to have promised her.

In the first year of their marriage plaintiff brought suit to compel her husband to make these gifts, to convey the property and for a receiver. She did not allege that the will had been revoked. She was just refusing to be fobbed off with a will when what she wanted was the cash, the jewels and the furs. Of course, the will could not be used to prove these promises to make present gifts and conveyances. And this typical golddigger case is said by appellees to be "exactly in point"!

We do not propose to be led into further analyses of cases that would not have weight with the Supreme Court of Washington. We content ourselves with remarking that much of the language quoted is certainly out of tune with the decisions of our Supreme Court.

III

CONCLUSION

The weakness of the position of appellees is demonstrated by their persistent efforts to draw attention from the main question at issue in the following respects:

1. The opening of their brief with an attack upon the credibility of the witnesses of appellants in spite of the finding as to their truthfulness expressed by the trial court.

2. Their denial that the testimony of appellants is "conclusive, definite and beyond legitimate controversy," this also in the teeth of the trial court's finding.

3. Their contention that the first and second wills of Kucks do not corroborate the oral testimony of appellants, again in flat contradiction of the finding of the trial court.

4. Their unwarranted attempt to inject into Kucks' proposition to Catharina a specific mode of division of the property between Grover and Garfield.

5. Their implausible assertion that the inclusion of the tiny $500 additional bequest to the foster grandson of Kucks precludes will number two from being considered as in performance of Kucks' promise, once more in conflict with the view of the trial court.

6. Their refusal ever to consider all of the factors making up appellants' case and insistence upon arguing each part as if it were the whole.

7. Appellees completely ignore the significance of the sacrifices and contributions of Catharina, *outside* the promise to marry, that constituted part performance on her part.

8. Appellees wholly fail to answer our argument as to full performance and its legal effect in the light of the Washington cases cited by us.

9. And, finally, their predominant reliance on cases from other jurisdictions as if this were a question of general law rather than one of the law of the State of Washington.

Accordingly, we renew our prayer for the reversal of the decree of the trial court.

Respectfully submitted,

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